



State of Ohio  
State Employment Relations Board  
65 East State Street, 12<sup>th</sup> Floor  
Columbus, Ohio 43215-4213  
(614) 644-8573  
ULP@SERB.ohio.gov

2022 APR 26 P 2:18

Case No.

2022-ULP-04-0045

DEFENDANT'S  
EXHIBITtabbles  
25

## UNFAIR LABOR PRACTICE CHARGE

**INSTRUCTIONS:** File *one original and one copy* of this form with the State Employment Relations Board at the above address. Serve *one copy* on the party against whom the charge is brought. See Ohio Administrative Code Rule 4117-1-02. If more space is required for any item, attach additional sheets; please number the items accordingly.

**NOTE:** If you wish to file unfair labor practice charges against both the employer and the union, then separate Unfair Labor Practice Charge forms must be filled out. For the form(s) to be filed against the union, fill out all sections of this form. For the form(s) to be filed against the employer, fill out all sections except section four, which is used to identify the employer for charges filed against the union or its representative(s).

## 1. Party Filing Charge: (Check One)

☐ Employee Organization/Union ☒ Employee ☐ Employer ☐ Other \_\_\_\_\_

Name:

Bryan J. Pesta

Address:

26845 Chapel Hill Drive

Telephone: work ( )

home (440) 319-8947

City, County, State, Zip:

North Olmsted, OH, 44070

E-mail:

bpesta22@cs.com

## 2. Name of Person Representing the Party Filing Charge:

(Representative must file a Notice of Appearance form.)

Jay Carson; Wegman Hessler

Address:

6055 Rockside Woods BLVD, Suite 200

Telephone:

(216)642-8826

City, State, Zip:

Cleveland, OH, 44131

E-mail:

JRCarson@wegmanlaw.com

## 3. Party Against Whom This Charge is Brought: (Check Only One)

☒ Employee Organization/Union ☐ Employer ☐ Other \_\_\_\_\_

Name:

American Association of University Professors (Cleveland State University)

Address:

2121 Euclid Avenue, SR-162

Telephone:

(216)687-4694

City, County, State, Zip:

Cleveland, OH, 44115

E-mail:

csuaaup1@gmail.com

## 4. Employer: (If different from item 1 or 3)

Cleveland State University, AC-113

Address:

2121 Euclid Ave

Telephone:

(216)687-3636

City, County, State, Zip:

Cleveland, OH, 44115

E-mail:

hr@csuohio.edu

**5. Basis of Charge:** Check all the boxes that apply. (See item #5 on the instructions for a link to the information needed to complete this section).

Charges against employers: (A)(1) ☐ (A)(2) ☐ (A)(3) ☐ (A)(4) ☐ (A)(5) ☐ (A)(6) ☐ (A)(7) ☐ (A)(8) ☐Charges against unions: (B)(1) ☐ (B)(2) ☐ (B)(3) ☐ (B)(4) ☐ (B)(5) ☐ (B)(6) ☒ (B)(7) ☐ (B)(8) ☐Jurisdictional Work Dispute O.R.C. 4117.11(D) ☐

## Unfair Labor Practice Charge (ERB 1005 - 2/21)

**6. Statement of Facts:** Provide a detailed statement of the facts explaining the alleged violation(s). Include who, what, where, when, how, and all dates. If you need more space, you may attach a separate sheet containing the Statement of Facts.

Please see the enclosed document.

A failure to provide the above information could result in the charge being dismissed for failure to provide a clear and concise statement.

## DECLARATION

I declare that I have read the contents of this Unfair Labor Practice Charge and that the statements it contains are true and correct to the best of my knowledge and belief.

To distinguish originals, please do not use black ink for signatures.

*Bryan J. Pesta*

*4/19/22*

Signature of Person Confirming the Content of Form

Date

Bryan J Pesta

Print or Type Name

THIS UNFAIR LABOR PRACTICE CHARGE WILL NOT BE ACCEPTED FOR FILING UNLESS THE PROOF OF SERVICE IS FULLY COMPLETED AND BEARS AN ORIGINAL SIGNATURE OF A REPRESENTATIVE OF THE PARTY FILING THE CHARGE.

## PROOF OF SERVICE

I certify that an exact copy of the foregoing Unfair Labor Practice Charge has been sent or delivered to:

*American Assoc. of University Professors (Cleveland State University)*

(Name and complete address of party against whom this charge is brought)

*2121 Euclid Ave, SR-162, Cleveland, OH 44115*

By ☐ Regular U.S. Mail ☒ Certified U.S. Mail ☐ Hand Delivery ☐ Other \_\_\_\_\_

this *22* (day) of *April* (month), *2022* (year).

Signature of Person Confirming Service of Form

*Jay Carson*  
Print of Type Name



## 6. Statement of Facts (Dr. Bryan J. Pesta)

### Summary

I was a tenured, full Professor of Management at Cleveland State University (CSU). The school terminated my employment as of 3/4/2022. They alleged I committed “academic research misconduct.” My union, the American Association of University Professors (AAUP; CSU Chapter), declined to take my grievance to arbitration. The facts in the timeline below show how the AAUP violated its duty of fair representation in my case by arbitrarily denying my request to pursue my grievance, arbitrarily or negligently failing to meet with me, and arbitrarily or negligently declining to provide representation during the disciplinary process initiated by CSU.

### Background

Before my termination, my “presence” at CSU spanned 36 years. I started in 1986 as a freshman majoring in psychology. After graduating in 1990, I next earned a master’s degree (1992) from CSU, also in psychology. In the mid-1990s, I taught in our psychology department first as an adjunct, and then as a term assistant professor. Around the year 2000, I migrated to our business college (where I also earned the MLRHR degree at CSU). I was hired as a tenure-track assistant professor of management in 2005, became an associate professor in 2010, and became a full professor in 2016. With recent retirements, I was the most senior member of my department.

I research individual and group differences in Intelligence (“IQ”). I am sincerely interested in why some people are smarter than others. CSU’s allegations against me stem from my IQ research, and my collaboration with another IQ researcher named John Fuerst. I knew of John prior to our collaboration because we published in the same research areas. As it turns out, John was also local to Cleveland, and so we met for lunch back in 2017.

John proposed a potential collaboration using NIH genetic data to study race/ethnicity and IQ. NIH data are highly sensitive. Participants can be identified just from their raw numbers in a spreadsheet, and so the data must be secured (e.g., not shared with others, etc.). One must also formally apply to the NIH just to get access to the data. To get access, however, one must be affiliated with a university. Thus, John proposed taking a series of “independent study” classes with me as his instructor so he would have CSU affiliation (and therefore access to the NIH data, under my direct supervision).

I agreed to collaborate with John, conditioned upon us looking at additional variables beyond just race and intelligence. I then submitted three separate applications (on three separate dates) to the NIH. One application was on sex differences (#18007), one was on race and IQ (#19747), and one was on mental health issues (#19090). All three applications, however, were for the same NIH dataset, “Trajectories of Complex Phenotypes” (TCP). I submitted three applications for the same dataset here because the research topics were different across the three applications, and I was attempting to fully comply with the complicated NIH application requirements.

The NIH ultimately approved all three applications for me to access the TCP data, plus they even later approved my applications for other datasets (e.g., the ABCD data). They did so even after

they alleged (Fall 2019; see below) that I seriously violated NIH protocol regarding my initial three applications.

Finally, I published one paper resulting from my use of NIH data: "Global Ancestry and Cognitive Ability" (Lasker et al., 2019; <https://www.mdpi.com/2624-8611/1/1/34/htm>). Complaints about this paper (from people who didn't know me and were external to CSU) triggered CSU to investigate and then ultimately fire me.

### Timeline

#### 4/12/2018

I submitted Application #18007 on "Sex Differences" to NIH (approved on 6/25/2018).

Note, John was not involved in this project, it was just for me. Also, I never even accessed the data for this application, as the brain imaging files were too large.

#### 7/15/2018

I submitted Application #19090 on "Mental Health" to NIH (approved on 8/30/2018).

I also submitted a one-year renewal request for these data on 8/29/2019 (approved on 9/23/2019). I didn't report the Lasker et al. publication (central to my whole case) on the renewal because it wasn't officially published until the next day. The Lasker et al. (2019) paper was published on 8/30/2019.

#### 9/19/2018

I submitted Application #19747 on "Race and IQ" to NIH (approved on 12/10/2018).

I also submitted a renewal request for these data on 12/3/2019 (approved on 2/20/2020). Note, NIH's approval here was after its complaint against me on 9/19/2019 (i.e., the NIH approved my future access to the data here, yet NIH characterized (to CSU's Provost) my case as being the most severe violation in its data-sharing history.

#### 8/30/2019

The Lasker et al. paper is published. This was my only publication using TCP data. Shortly thereafter, students (external to CSU; "Bird et al.") objected to this paper and complained to both CSU and the NIH. The students alleged fully 21 different violations I committed related to NIH application issues, and / or research misconduct in general.

#### 9/19/2019

I received an email from NIH. It regarded Bird et al.'s complaints about my research. The NIH identified several issues they had serious concerns with, and they demanded I address them within two weeks. Note, Despite the NIH's "serious concerns" here, they did not suspend my continued access to the data for another two years.

9/20/2019

I sent a detailed reply to NIH addressing their concerns. Note, the NIH did not reply to my email here until 615 days later (5/27/2021), despite having solicited / demanded my response the day before.

9/23/2019 and 2/20/2020

Despite not replying to my email, and despite the concerns expressed on 9/19/2019, the NIH continues to approve my new data applications, renewals, and close-outs (for various projects indicated by the dates above).

10/7/2020 and 11/18/2020

I was being harassed by several people and groups due to the nature of the research I was conducting. For example, a student group at CSU (the Student Socialists) even organized protests to get me fired. I therefore contacted the Foundation for Individual Rights in Education (FIRE). FIRE wrote detailed letters to CSU explaining how and why my research is protected under academic freedom principles.

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5/27/2021

NIH finally replies to my email dated 9/20/2019 (*615 days later*). Here they drop some of the allegations from their initial 9/19/2019 email to me, but instead replace them with some newer allegations.

7/26/2021

As part of their nine-month, formal investigation of me, CSU officially charges me with academic research misconduct. The investigation was supposed to last (by CSU's own policy) no more than 120 days. Instead, it lasted almost nine months.

8/23/2021

This was my first correspondence with the AAUP. Note, throughout the entire nine-month investigation, the union never once met with me (even via Zoom) to discuss my case. All correspondence was via email and is pasted below, together with some points of clarification [in brackets] as added by me. The email headers have been removed for easier reading. I am happy to produce all of the email correspondence in its original form upon request.

From: Bryan Pesta; To: Birch Browning [AAUP Grievance Officer]

Dear All,

Thank you for your willingness to help. I have copied Attorney Jay Carson here. Jay is the lawyer I have retained to defend myself regarding these charges. Please note that early on in this



investigation, I also had the assistance of the Foundation for Individual Rights in Education (FIRE).

My situation, though, is unfortunately complex, as I have a paper trail of documents and emails going back to 2019. I will send you all these plus a timeline by tomorrow. Today, I need to focus on further prepping my class for tonight.

In the interim, please find an "abstract" below, and CSU's official charge against me (attached). It might take a Zoom meeting to make all this understandable, and I wonder what your schedules are like. I am free any time/day but Mondays... **[The union never once met with me, despite my request here.]**

From: Birch Browning; To: Bryan Pesta

Bryan,

As I understand it, the union is usually hesitant to be involved once outside counsel has been retained [**yet the union remains my exclusive bargaining agent, with a duty of fair representation**]. That being said, the union does have an interest in making sure that the Collective Bargaining Agreement is properly followed. Note that these are my personal understandings and do not necessarily represent the position of the union.

I'll consult with the officers of the CSU-AAUP to make sure I'm on strong footing here. We will, of course, do everything we can within our constraints and mandates.

From: Don [CSU AAUP President]; To: Bryan

It would be helpful to know exactly what you are seeking from the union so we can present this to the Executive Committee. Our highest grievance level is when we typically bring in legal representation; everything before that is an effort to reach a resolution before escalating to legal action.

Given that you have retained counsel, what are you expecting from the union that would be different than what your attorney can already provide?

Best,

Don

From: Bryan Pesta; To: Don

Don,

Thank you for the prompt reply. I would argue that CSU is violating (or will be) the CBA's just cause clause. Also, I would like to exercise my Weingarten v. NLRB rights [i.e., **the Ohio SERB counterpart**] for any CSU interactions going forward.

But thank you for further looking into this.

Bryan

From: Jay [my Lawyer]; To: Don

I'm Dr. Pesta's counsel—I encouraged him to contact the Union to make sure that he was aware of all of his rights under the CBA, that the Union was aware of his current situation, and that everyone was on the same page. My representation of Dr. Pesta has been focused on defending and responding to charges from the NIH and assisting Dr. Pesta in presenting his case in the current investigation. My sense is that if there are any CBA grievance issues that come out of this investigation or action taken against him, that would be more in the Union's wheelhouse than mine.

If I can provide any further information, please let me know.

Best, Jay R. Carson

8/30/2021

From: Birch; To Bryan

Bryan,

I consulted with the CSU-AAUP Executive Committee regarding your request for union representation during the NIH investigation. The union's interest in this and every case is to ensure that the Collective Bargaining Agreement (CBA), along with any policies that are derived from the CBA, are followed scrupulously.

The CSU-AAUP has no specific role in the NIH investigation process. But, as a member of the bargaining unit, you have the right to request union representation in any inquiry or meeting that may result in discipline or sanction that occurs within the investigation process. If you request representation at a meeting, I will accompany you or attend virtually provided the meeting does not conflict with my teaching responsibilities.

In the event that the deciding officer in this case recommends any sanctions, the union will vigorously defend the policies and procedures, including the 'just cause' clause. [The AAUP did not do this. And, despite multiple requests by me, the union wouldn't even give me simple feedback as to whether they thought the just cause clause was violated here] The Executive

Committee may, at its own discretion, file a grievance in response to evidence of a possible violation of the CBA...

9/7/2021

My first interview with CSU's internal investigation committee. **[The AAUP was not present for my first interview here. This is despite my request in an 8/23/2001 email (see above) that "I would like to exercise my Weingarten v. NLRB rights [i.e., the Ohio SERB equivalent] for any CSU interactions going forward.]**

9/12/21

From: Bryan; To: Birch

Please let me know your thoughts:

Bryan

(Here I provided a Zoom link to my first interview with the CSU investigatory committee).

**[My email here constitutes my first formal request for feedback from the union about the merits of my case.]**

9/15/21

From: Birch; To Bryan

Bryan,

I've viewed the video, and I don't see any contractual, policy, or procedural concerns. **[This is the union's sole feedback (or coaching) for me about my case so far].**

Birch

9/16/21

From: Bryan; To: Birch

Thank you, Birch.



What about the just cause clause?

Bryan

From: Birch; To: Bryan

As I read it, 'just cause' has to do with any sanctions, as in, the sanction matches the determined offence. I've cc'd others who may have a different understanding of the contract.

If I recall correctly from my reading of the policy, there may eventually be a committee that decides if you've committed academic misconduct. I also think I recall that the Provost then decides the sanction, if any, if found guilty. That's the point where 'just cause' comes into play.

Remember, the union's role here is not to make a determination, but to make sure the contract is followed both in letter and spirit.

Birch

From: Don; To: Bryan

Bryan,

Birch's assessment is correct. If the administration decides to pursue sanction or dismissal, then the contract requires a committee of equal representation between administration and faculty union members to determine if just cause is present for the proposed action. **[This was a management committee deciding my guilt. Shouldn't the union do some type of its own investigation?]**

12/6/21

From: Bryan; To: Birch

Birch,

Thanks for contacting me [for an update].

Yes, the faculty investigative committee just "convicted" me of four "serious instances of academic misconduct". I wrote a rebuttal, they get to rebut this, and then it goes to the Provost for discipline.

I swear I've done \*absolutely\* nothing the committee has convicted me of.

Bryan

From: Birch; To: Bryan

I'm sorry to hear this.

If you want to and you're comfortable, you can share the documents with me. The key factor here is that any discipline must be progressive and corrective rather than simply punitive. [A “key factor here,” yet the union did not grieve on this point, given I immediately faced the most severe discipline possible— my termination.]

Please let me know how I can help.

Birch

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1/20/22

From: Bryan; To: Birch

Dear Birch,

Just curious whether you or the AAUP have any thoughts on my case, given the documents are out? [My second request for simple feedback from the union about my case.]

Sincerely,

Bryan

From: Birch; To: Bryan

Bryan,

I've read the documents but, given that there are 170 pages, I did not study them. [This is a complex case full of technical jargon. A quick read by just one executive committee member cannot constitute “fair representation.”]

I'll remind you, though, that the union's interest is only to make sure that the process carefully follows the provisions in the contract and the personnel policies. The only opinions that matter at

this point are the members of the ad hoc committee [i.e., management. The union seems to argue that only management's position is relevant when justifying employee disciplinary actions. This ignores employee rights under the just cause clause.]

I will be at the meeting next Friday morning to observe. If I think they are deviating from procedure, I will be sure to speak up. If you have any questions during the meeting regarding procedure, you should feel free to ask me.

All the best, Birch

From: Bryan; To: Birch

I was wondering specifically about the AAUP's opinion on whether the "just cause" clause will be violated here once I am fired. [My third request for feedback from the union about my case.]

Bryan

From: Birch; To: Bryan

First, I am sorry that you are in this situation. I simply cannot imagine how stressful this must be for you.

I do understand your question regarding just cause. I am not in a position to make a judgment; that's initially the role of the [management] ad hoc committee. And ultimately the role of the union also.

After the Provost responds to the committee, I will share the basic findings and the Provost's response with the executive committee, who are the only ones who can file a level 4 grievance directly to the Provost. See sections 8.4 and 9.16 in the contract. (As a grievance officer, I'm a member of the EC but I do not have a vote.)

I am reviewing the relevant contract clauses and the policy documents and will be at the meeting to make sure the committee and the administration follow them.

Birch

2/7/22

From: Bryan; To: Birch



Thank you for participating in our meeting on 1/28, and sorry for the delay in reaching out.

I didn't really see any procedural issues for that meeting, so I am wondering what the AAUP's take is here.

Sincerely,

Bryan

From: Birch; To: Bryan

Bryan,

I don't see any procedural issues, either. When you get a response from the ad hoc committee and then the Provost, you can decide if you want me to share it with the Executive Committee. If they think any part of the response is grievable, they can vote to file one.

Birch

2/28/2022

CSU terminates me (effective 3/4/2022).

3/2/2022

From: Bryan; To: Birch

Dear Professors Browning and Allensworth-Davis,

I am trying to figure out what my next step is here. My situation is also time sensitive, as my understanding is I will not be paid throughout the appeals process (i.e., whether the appeal is an AAUP grievance, or something else).

Could you please kindly answer the following questions as soon as you possibly can?

Thank you for your consideration,

Bryan

1. Does the AAUP think I have a case? You may be straight shooters here. Committee members have overwhelmingly rejected my arguments (though I believe they didn't understand the issues, nor did the Provost), so I guess it's likely you might too. I still submit, though, that I did not

commit academic research misconduct. [My fourth request for feedback from the union about my case].

2. Will AAUP file for (expedited?) arbitration? [Their answer was “no,” despite my seniority and standing as a tenured full professor with 36 years of presence (as student or faculty) at CSU, and despite the promises above].

3. Assuming a grievance is filed, I am not sure why I need to clear my office (and return keys, etc.) by this Friday, versus after the resolution of the grievance. It would be especially helpful to retain CSU email access throughout an appeal. [This was never addressed by the AAUP.]

3/4/2022

AAUP declines to file for arbitration in my case.

(My last correspondence with the union):

From: Birch; To: Bryan

Don and I have carefully reviewed the entirety of the process you have endured. Given that the CSU-AAUP is not in a position to substitute their judgment for that of the various committees nor for the Provost [1], and that we do not see a contract process violation [2], we will not file a chapter grievance in this case.

And, given that as of today you will no longer be a member of the bargaining unit, this concludes the union's involvement in the case [3].

On a personal note, I wish you all the best during this difficult transition for you.

Birch

[1] Essentially the union is saying that because management decided I was guilty, I must be guilty (i.e., who are the Union to question management?). Coming from AAUP executive-committee members, this statement seems completely arbitrary if not pretextual. What more important role could a union play for the benefit of its members?

[2] From the employee's point of view, the “just cause” clause is probably the most important line item in the CBA. CSU violating this clause is the “process violation” here. I had asked the AAUP multiple times about their opinion on this issue with no response.

[3] By this logic, no terminated employee could ever grieve his / her termination. This statement seems ignorant of basic labor relations processes, yet it comes from AAUP executive-committee members.

Bryan J. Pesta



Jay R. Carson  
Partner  
jrcarson@wegmanlaw.com  
p 216.642.3342  
f 216.642.8826

April 22, 2022

**Via Certified Mail**

State of Ohio  
State Employment Relations Board  
65 East State Street, 12<sup>th</sup> Floor  
Columbus, OH 43215

Re: Brian Pesta v. American Association of University Professors

Dear Sir or Madam:

Enclosed for filing, please find an original and (1) copy the following documents in relation to the above-referenced matter:

- 1) Unfair Labor Practice Charge and corresponding documentation; and
- 2) Notice of Appearance for the undersigned.

Please file the documents accordingly and return a date-stamped copy of the first page of the Charge and Notice in the enclosed self-addressed stamped envelope. Should you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Very truly yours,

WEGMAN HESSLER

Jay R. Carson

Encl.  
JRC/res